Single Bench

IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT BILASPUR

Cr.Appeal NO. 359 /2005

APPELLANT (IN JAIL)	Mahesh Ram son of Bhoglo Ram, aged 35 years, Cultivator resident of Village Nariyal Dand Badotoli, Police Station Kansabel, District Jashpur, (Chhattisgarh)
	VERSUS
RESPONDENT	State of Chhattisgarh through S.O. Police Station Kansabel.
CONVICTION	U/S 376 (1) I.P.C.
SENTENCE	7 years rigouous Imprisionment and fine of Rs. 1000/- Indefault Six months further rigorous Imprisionment.
SESSION TRIAL NO.	08/2005

CRIMINAL APPEAL UNDER SECTION 374 CRIMINAL PROCEDURE CODE 1973

(24)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.359/2005

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Mahesh Ram.

Versus

State of Chhattisgarh

Shri J.S.Baraik, Counsel for the appellant.

Shri Ravindra Agrawal, P.L.for the State.

ORAL JUDGMENT

(Passed on 17th of January 2006)

This appeal is directed against the judgment dated 11.02.2005 delivered by Shri T.R. Barman, Additional Sessions Judge, Jashpur in sessions case No.08/2005 whereby the appellant was convicted under Section 376(1) I.P.C. and was sentenced to undergo R.I. for 7 years and a fine of Rs.1000/-, in default of which, to undergo further R.I. for six months.

2. Briefly stated the prosecution story is that on 13.11.2004 at about 8.00 P.M. P.W.12, a widow, in order to warm up in front of fire, was sitting in the *purchee* of her house. The appellant came there and forcibly holding her right hand, dragged her near a bush and commit rape on her. Sukhan Ram P.W.11 came at the spot and saw the appellant lying over his mother. The appellant slapped

Sukhan Ram and ran away. F.I.R. was lodged on 14.11.2004 at 5.30 P.M. in Police Station Kasabel, District Jashpur vide Ex.P.10. Medical examination of the prosecutrix was conducted by Dr. Mrs. R. Toppo P.W.1 who did not find any symptoms of recent sexual intercourse vide report Ex.P.2. No external or internal injuries were found on the prosecutrix. Dr. Y.K.Toppo P.W.2 examined the accused appellant and opined vide Ex.P.4 that the appellant was capable of performing sexual intercourse. After completion of investigation, the appellant was prosecuted under Section 376 (1).

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 13 witnesses. The trial Court relying upon the testimony of prosecutrix P.W.12 and her son Sukhan Ram P.W.11, convicted and sentenced the appellant as aforesaid in paragraph 1.

4. Shri J.S.Baraik, learned counsel for the appellant has contended that the prosecution has utterly failed to prove the charge under Section 376 (1) I.P.C. against the appellant since there was absolutely no evidence of penetration of penis by the accused-appellant. He referred to paragraph 6 of the testimony of the prosecutrix to contend that at the most the offence under Section 354 of the I.P.C. could be held to be established against the appellant. On the other hand, Shri Agrawal has supported the judgment of the trial Court and relying on a decision rendered in the case of *Madan Gopal Kakkad v. Naval Dubey and another*

reported in 1992 JLJ 377 (SC) argued that for constituting the offence under Section 376 (1), even the slightest penetration would constitute the offence of rape and complete act of sexual intercourse would not be necessary.

5. Having heard the rival contentions, I have perused the record of sessions Case No. 08/2005. It is settled law that for constituting an offence of rape even slightest penetration of penis by the appellant inside the vagina of the prosecutrix would constitute the offence of rape. The prosecution has to establish this by leading evidence either from the mouth of the prosecutrix herself or by medical evidence. In this case, Dhanpati Bai has in para 6 stated that "*अभियुक्त सेमी के झूझ के पास पटक कर मेरी साड़ी को हटाकर बलात्कार करने के लिये प्रयास किया था लेकिन संभोग नही कर पाया उसी समय मेरा लड़का आ गया ।*" In her examination-in-chief, she has stated that after undressing her, the accused was lying over her and at the same time her son arrived whereupon the accused left her, slapped her son and ran away. Although she said that the accused committed rape on her but there is absolutely no evidence to show that she meant thereby and to show that the accused had even done the slightest penetration of his penis inside the Labia Majora or Labia Minora of the prosecutrix. Sukhan Ram P.W.11 also stated that he saw that the accused was lying over his mother. On seeing him, the appellant slapped him and ran away. Even in his testimony, there is absolutely nothing to suggest that even the slightest penetration of penis has taken place. Whether the

accused-appellant had penetrated the penis even slightly, is not a matter of inference but has to be proved by the prosecution by leading cogent evidence beyond doubt. The testimony of Dr. Mrs. Toppo P.W.1 also shows that she did not find any symptoms of rape on the body of prosecutrix or any external injuries on her person. Even in the F.I.R. Ex.P.10, there is no mention that penetration had taken place. It only says that when Sukhan Ram P.W.11 came to the spot and asked the appellant as to what was he doing, the appellant left the prosecutrix, slapped him and ran away and till that time, the appellant had not completed his work. Thus, the necessary ingredients for constituting the offence under Section 376 (1) I.P.C. are missing not only in the F.I.R. but also in the testimony of the prosecutrix P.W.12 and Sukhan Ram P.W.11. However, it is clearly borne out from the unrebutted testimony of the prosecutrix that the appellant had dragged her to a nearby bush and removing her saree was lying on her. This clearly constitutes an offence under Section 354 I.P.C. for outraging the modesty of a woman.

6. Having considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the prosecution has failed to establish the charge under Section 376 (1) against the accused-appellant. However, an offence under Section 354 I.P.C. is proved beyond reasonable doubt against the accused-appellant. In the result, the appeal is partly allowed. Conviction of the appellant under Section 376 (1) of the I.P.C. and the sentence awarded

thereunder is set aside. The appellant is convicted under Section 354 I.P.C. and is sentenced to R.I. for two years and a fine of Rs.5,000/-, in default, to undergo additional R.I. for six months. Out of the amount of fine of Rs.5,000/-, Rs.4000/- shall be paid to the prosecutrix-Dhanpati Bai P.W.12 as compensation. Set off for period undergone in jail shall be given to the accused appellant under Section 428 Cr.P.C.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani